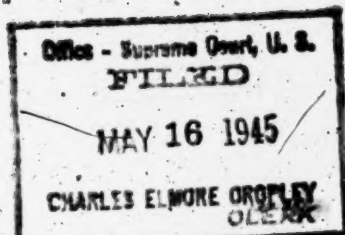


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SUPREME COURT OF THE UNITED STATES

OCTOBER, 1944, TERM.

No. 174

62

THE EAST NEW YORK SAVINGS BANK,

against

ALVIN HAHN and HANNAH HAHN, his wife,

Appellant,

Appellees.

BRIEF ON BEHALF OF
THE SAVINGS BANKS ASSOCIATION
OF THE STATE OF NEW YORK
AS AMICUS CURIAE

GEORGE R. FEARON,
Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER 1944 TERM

No. 1174

THE EAST NEW YORK SAVINGS BANK,

Appellant,

against

ALVIN HAHN and HANNAH HAHN, his wife,

Appellees.

BRIEF ON BEHALF OF THE SAVINGS BANKS ASSO- CIATION OF THE STATE OF NEW YORK, AMICUS CURIAE, IN SUPPORT OF REVERSAL AND JUDGMENT FOR PLAINTIFF

STATEMENT

This action tests the constitutionality of the Mortgage Moratorium Law of New York State, Chapter 93 of the Laws of 1943.

This brief is filed by The Savings Banks Association of the State of New York as *amicus curiae* with the consent of both parties to this action.

Said Association is composed of the individual savings banks of the State of New York. Substantially all of said savings banks have mortgages which are subject to or affected by the Mortgage Moratorium Law (Ch. 93 of the Laws of 1943). Said Association and its member banks believe that the emergency which justified the original

Mortgage Moratorium Law in 1933 has long since passed and that Chapter 93 of the Laws of 1943 which continued the moratorium is unconstitutional in that it impairs the contractual rights of an owner of a mortgage and in that it denies to an owner of a mortgage other than a Savings and Loan Association the equal protection of the law. The decision in this case will affect all of the savings banks in the State of New York.

For the reasons stated, The Savings Banks Association of the State of New York is interested in the reversal of the judgment appealed from.

We will endeavor to avoid duplication of appellant's argument. We do, however, desire to stress the fact that on the undisputed evidence in the instant case it is clearly established that the emergency which caused the enactment of the Moratorium Law of 1933 was not "still existing" on March 11, 1943, when Chapter 93 of the Laws of 1943 was passed.

We also desire to call the Court's attention to the fact that the most recent legislative investigation with respect to the mortgage situation was made in 1937 by the Nunan Commission, whose report was submitted to the Legislature on January 30, 1938 (Legislative Document (1938) No. 58), and the so-called Janes Committee Report submitted to the Legislature on February 24, 1942 (Legislative Document (1942) No. 45).

The Nunan Committee was appointed pursuant to a joint resolution and the pertinent parts of the resolution are as follows:

"Whereas, The Legislature heretofore declared that an emergency existed by reason of which a

moratorium on actions to foreclose mortgages on real property and in relation to the entry of deficiency judgments in such actions was necessary and such moratorium has been established and is now in effect; and

"Whereas, Such emergency still exists but at some future date may no longer exist; and

"Whereas, It would appear to be to the interest of all concerned that a desirable method be evolved in order that at some future date there may be no abrupt termination of such moratorium; now, therefore, be it

"Resolved (if the Assembly concur), that a joint legislative committee be, and it is hereby created, to consist of three Senators to be appointed by the Temporary President of the Senate, and three members of the Assembly to be appointed by the Speaker of the Assembly to investigate and make a thorough study of the effect of the existing moratorium on actions to foreclose mortgages on real property and the entry of deficiency judgments in such actions, including the most desirable method by which such moratorium may be terminated without causing hardship to property owners and without adversely affecting the present real estate market, and to study also the advisability and feasibility of abolishing deficiency judgments on bonds or other evidence of indebtedness secured by mortgages on real property in the state." (Legislative Document (1938) No. 58, p. 3.)

It is to be noted that in the resolution the Legislature recited that the original emergency still exists and did not leave that question to the Committee for investigation.

The Janes Committee was appointed pursuant to a joint resolution of the Legislature adopted at the 1941 session, the pertinent parts of which are as follows:

"Whereas, The Legislature heretofore declared that an emergency existed by reason of which a moratorium on actions to foreclose mortgages on real property and in relation to the entry of deficiency judgments in such actions was necessary and such moratorium has been established and is now in effect; and

"Whereas, Such emergency still exists but at some future date may no longer exist; and

"Whereas, It would appear to be to the interest of all concerned that a desirable method be evolved in order that at some future date there may be no abrupt termination of such moratorium; now, therefore, be it

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(Legislative Document (1942) No. 45, p. 42.)

It will again be noted that the Legislature declared that the original emergency existed and did not leave that question open to the Janes Committee.

While it is true that the so-called Janes Committee report submitted on February 24, 1942, contained the following finding:

"(1) That the emergency still exists * * *"
the rule is well settled in the New York State Legislature that:

"Select committees are charged with their peculiar duties, when appointed, and cannot go beyond the line marked out for them. (Italics supplied.) (Clerk's Manual of Rules, etc., for Regulation of Business of Senate and Assembly, State of New York, page 498, 1944 Edition.)"

Attention should be called also to the fact that the so-called report was signed by only three of the six appointed members of the Committee and that none of the five ex officio members signed the report. (See pages 3 and 41 of Legislative Document (1942) No. 45.) It was therefore an expression of the opinion of but three out of eleven members of the Committee, or, if the ex officio members are disregarded, it was the expression of opinion of but three out of six members of the Committee.

Under parliamentary rules, a majority of a Committee is required to make a report. Under the Senate Rule 7, a report may be made by a majority of any Committee, or by six members of any Committee with the Chairman voting therefor and less than six members opposed. (Clerk's Manual of Rules, etc. (1944), page 42.)

The Journal of the Proceedings of the Senate for February 24, 1942 (page 432, Senate Journal, 1942), contains the following:

"By unanimous consent Mr. Janes submitted the report of the Special Joint Legislative Committee on Mortgage Moratorium and Deficiency Judgments, signed by the Chairman and only two members of the Committee, which was ordered printed and referred to the Committee on Mortgages and Real Estate."

Nowhere does it appear that the report was ever adopted.

Consequently, although the document states:

"The Committee finds:

"(1) That the emergency still exists * * *"

the fact of the matter is that the Committee as such never made any report and that the most that can be said is that one member of the Senate and two members of the Assembly made such a statement, notwithstanding the fact that they had never been authorized or directed to inquire into that matter. 6

The foregoing is called to the Court's attention so that it will not be misled into believing that the declaration of an emergency contained in Section 1 of Chapter 93 of the Laws of 1943 was based upon an inquiry and report by a legislative committee as to whether or not such an emergency did in fact exist.

We believe it is a fair statement to say that the Legislature has never at any time subsequent to the adoption of the original moratorium law in 1933 and prior to the adoption of Chapter 93 of the Laws of 1943 conducted any study

by any legislative committee for the purpose of determining whether or not an emergency *then existed*. The Legislature has had a bear by the tail and has been trying to find a way to let go. It has been concerned with the possible political repercussions as much as with the economic aspects of the matter.

However, if the so-called Janes report should be considered by the Court as part of the record in the case, The Savings Banks Association of the State of New York desires to call the Court's attention to certain statements it contains which tend to establish that the public emergency existing in 1933 no longer existed when the Legislature enacted Chapter 93 of the Laws of 1943.

(See Legislative Document (1942) No. 45.)

"The Mortgage Moratorium legislation was originally enacted and its continuation can be justified only by reason of the existence of a public emergency."
(p. 16.)

" * * *

"In 1933 mortgage foreclosures throughout the country were at the highest point in over fifty years. The general business index, factory employment, and the factory payrolls were at or near their lowest point, and every community was staggering under the burden of unemployment. These were some of the outstanding features of the economic emergency at that time. * * *
(p. 16.)

"In many respects general business conditions have improved through the stimulus of the defense program.

"According to the figures submitted to the committee by the State Department of Labor, the index of factory employment in August, 1933, was 65.7. * * *

"The composite index of business in the city of Buffalo, prepared by the Chamber of Commerce in that city, stood at 80.9 in August, 1933, and in July, 1941, it had reached 142.1, an increase of 75 per cent. Employment in a selected group of 130 of Buffalo's largest industrial plants showed an average total number of employees in 1933 of 32,016 and in August, 1941, of 77,950. Payrolls of these same plants increased from a weekly average of \$710,492 in 1933 to \$2,910,844 in August, 1941.

"According to figures submitted by the Rochester Chamber of Commerce, the Rochester business index increased 75 per cent between August, 1933, and August, 1941. During this same period the factory employment index increased 84 per cent. The factory payroll index increased 192 per cent. Average weekly factory earnings increased 58 per cent and composite employment in that city showed an increase of 65 per cent.

"According to charts and figures compiled by the Syracuse Chamber of Commerce, the average industrial wage in that city in August, 1933, was \$22.19, and in August, 1940, it was \$28.59. In November, 1941, payrolls showed a further increase of 46.92 per cent over the figures for the corresponding date in 1940. New car registrations in Onondaga County increased from 4,847 in 1933 to 9,789 in 1940. Bank clearings increased from \$161,292,630 in 1933 to \$252,517,598 in 1940.

"The comparative figures from Rochester, Buffalo and Syracuse are probably typical of the business stimulus in those communities which have benefited by a great volume of defense business.

"Another indication of the general improvement in business conditions may be found in the figures indicating the percentage of tax delinquencies in the cities and villages of the State. (pp. 16-17.)

"* * *

"Records of employment, payrolls, average earnings, business indices, and tax delinquencies clearly point to an improvement in economic conditions since 1933. (p. 19.)

"* * *

"Although there has been a marked increase in living costs, such costs today are substantially lower than during the World War and the postwar period. (p. 21.)

"* * *

"Many of the mortgages dated prior to July 1, 1932, were placed during the boom period in real estate. Market values have fallen and much of this property is today worth less than the face amount of the mortgage by which it is encumbered. The experience of the financial institutions in regard to the properties taken over and sold by them fully support this conclusion. It is also apparent that much of this property is unable to produce an income sufficient to meet carrying charges. (p. 24.)

"* * *

"Consideration should be given to the probable real estate trends of the next few years. Real Estate Analysts, Inc., have prepared a chart showing the cycles of real estate booms and depressions from 1800 to 1940. This chart indicates that booms and depressions in real estate follow one another with considerable regularity. Experience has indicated that there is a cycle of approximately eighteen years between the crest of one boom period and another with an intervening period of depression.

"According to this chart real estate entered a depression period at the beginning of 1930 and should have emerged from such depression about 1938 or 1939. It was not, however, until 1940 that real estate passed above the normal level. *By December 1, 1941, it was nearly 20 per cent above normal.* (p. 27.)

"In the spring of 1941 an action was brought in Queens County to foreclose a moratorium mortgage where there was a default only in the payment of principal. The complaint in the action referred to the moratorium laws and then proceeded to set forth many facts indicating that the emergency had expired and that the moratorium laws be declared unconstitutional for this reason and that foreclosure of the mortgage be permitted. A motion to dismiss the complaint was denied, on which motion an opinion was written by the Court holding that the complaint stated a good cause of action and that if the plaintiff was able to prove the facts alleged in the complaint the moratorium laws would be unconstitutional because of the expiration of the emergency. (*Kaelin v. Michelson*, 176 Misc. 536, Special Terms, Queens County, March 26, 1941.)

"The committee is informed that this suit was never brought to trial owing to the death of the plaintiff.

"The Kaelin case suggests the very real possibility that the courts may make a finding that no emergency exists which will render all of the moratorium legislation unconstitutional and leave the property owners without any protection.

"This possibility together with the present business stimulus provided by the defense program and the war, with the corresponding improvement in the real estate market, all point clearly to the fact that we must now squarely face the problems presented by the moratorium and attempt to find an equitable solution." (pp. 27-28.)

The document further states:

"The purpose of the moratorium was to protect the home owner. That purpose can no longer be achieved by a mere continuation of the law. There must be reasonable amortization plus a reasonable rate of interest." (p. 36.)

and

"(2) That conditions generally in real estate have improved and the curtailment of building during the war seems likely to further increase values. That some permanent solution of the moratorium problem should now be made before we pass from the period of war stimulated business activity into a possible period of serious postwar depression." (p. 5.)

Examination of the document as a whole would indicate that the Committee was concerned primarily with the

problem of tapering off the mortgage moratorium rather than with determining whether or not the emergency which existed in 1933 still existed. Some members of the Committee apparently arrived at the conclusion that the proper method of tapering off was through amortization. (See Findings, p. 6, and Recommendations, pp. 7-8, Legislative Document (1942) No. 45.)

So far as appears from Legislative Document (1942) No. 45, very little of the evidence which was presented by the plaintiff upon the trial of this case was considered by the Janes Committee, and most certainly the Committee did not take into consideration the historical evidence and data to which the Court's attention is called on pages 17 to 25 of appellant's brief in this Court, and of which we ask this Court to take judicial notice. (*Chastleton Corp. v. Sinclair*, 264 U. S. 543.)

POINT I

Chapter 93 of the Laws of 1943 violates the contract clause of the Federal Constitution.

The Legislature of the State of New York declared in Chapter 793 of the Laws of 1933 that

"a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the

enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination."

In passing upon the constitutionality of this statute, the Court of Appeals said in *Klinke v. Samuels*, 264 N. Y. 144, page 149:

"As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering, the Legislature had asked through these laws, for security holders to wait a reasonable time for universal economic conditions to improve, provided interest and taxes are paid.

"After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.

"That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People (Title & Mortgage Guarantee Co. of Buffalo)* (264 N. Y. 69), and *Home Building & Loan Assn. v. Blaisdell* (290 U. S. 398)."

It is clear that the economic factors existing in 1933 which the Legislature found warranted the mortgage mora-

torium legislation of that year no longer existed in 1943, (See dissenting opinion by Lewis, J., in *East New York Savings Bank v. Hahn*, 293 N. Y. 622, 631-634.)

In 1943 there was an active real estate market. One and two-family houses were scarce. They brought very good prices which represented the sound intrinsic values of the property. Those prices represented the amount a willing seller could procure from a willing buyer without any compulsion on either side unless it was on the buyer's part (Fols. 311-312). Mortgage loans were readily available on one and two-family dwellings from 60% to 80% of appraised values (Fol. 313).

Bank deposits had greatly increased, as had money in circulation. Weekly payrolls as well as the number of wage earners in the state had sky-rocketed. Department store sales showed large increases, and the investment by individuals in Series E war bonds in 1943 amounted to \$81.00 per capita in New York State as against \$65.10 per capita in the country at large (Fols. 111-136).

As of January 1st, 1944, the savings banks had available for mortgage lending under the law a sum in excess of a billion dollars and had taken about a hundred million dollars in mortgages in Pennsylvania, New Jersey and Connecticut and paid premiums on these loans in order to get their money invested (Fols. 146, 155-156). Real estate held by savings banks has been consistently declining; foreclosures have been declining, and new mortgage loans were greatly on the increase up until 1941 when building construction was necessarily curtailed (Ex. 6. p. 141).

In October, 1941, vacancies in apartment houses of nine stories and over were 11.1% ; in February, 1944, they were

1%. In October, 1941, vacancies in six-story elevator apartments were 8.9% ; in February, 1944, they were 0.5%. In October, 1941, vacancies in walkup apartments were 7.6% ; in February, 1944, they were 0.8% (Ex. 12, p. 148). Tax delinquencies in New York City had decreased from a high of 26.46% in 1932 to a low of 7.76% as of June 30, 1943 (Ex. 14, p. 153).

The Savings Banks Association of the State of New York as *amicus curiae* respectfully submits:

(a). That it is clear from the testimony in the instant case that in 1943 a real estate market existed and still exists where it is possible to get out of each parcel of real property whatever value there is in it. That any mortgagor having a real equity can protect such equity by refinancing or by an adjustment of his present mortgage. That the emergency which existed in 1933 has long since passed, and that the emergency to which the Legislature referred when it enacted Chapter 93 of the Laws of 1943 did not in fact exist at that time.

(b) That if it be found that the emergency which existed in 1933 still existed in 1943 when Chapter 93 of the Laws of that year was passed, such an emergency cannot be held to be temporary in character.

If it is not temporary in character, we submit that under the decisions of the New York Court of Appeals and the United States Supreme Court the act is not constitutional. (See *Klinke v. Samuels*, 264 N. Y. 144-149; *Block v. Hirsh*, 256 U. S. 135, 157; *Home Building & Loan Association v. Blaisdell*, 209 U. S. 398, 447, par. 5; *Matter of People (Title & Mtg. Guar. Co.)* 264 N. Y. 69, 95-6.)

In *Jefferson Standard Life Ins. Co. v. Noble*, 185 Miss. 360; 188 So. 289, the Court said:

"In the consideration of this case and its solution, we have not discussed the depression except as it may be related to a public emergency. The economic depression may be with us continuously as our normal status, but what we have said is that a public emergency cannot be said to have existed in 1938, nor does it exist now. It may be that the thing which was at one time considered extraordinary has now become ordinary. We do not say that economic conditions are normal. We doubt if expert economists can fix with reasonable certainty a financial and economic standard.

"Public emergency as herein referred to must of necessity be temporary in character. An economic depression may not be temporary. The exercise of the police power of the state may not be exerted simply because of such a depression, although it may be a prime factor in thrusting a public emergency upon a commonwealth."

The operation of the Moratorium Law of 1933 could not validly outlast the emergency which prompted its enactment. It could not be so extended as to suspend the contract rights of the mortgagee beyond that emergency.

Home Bldg. & Loan Association vs. Blaisdell, 290 U. S. 398, 442.

"A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

Chastleton Corp. v. Sinclair, 264 U. S. 543, 547-8.

POINT II

Chapter 93 of the Laws of 1943 violates the equal protection clause of the Federal Constitution.

The effect of Chapter 93 of the Laws of 1943 (Mortgage Moratorium Act) is to prevent the foreclosure of any mortgage, dated prior to June 1, 1932, held by any person, firm, corporation or association other than a savings and loan association, on account of a default in the payment of principal secured by such mortgage, provided the owner of the mortgaged premises shall pay the unpaid principal amount at the rate of one per centum per annum and shall pay the taxes on said premises and the interest on said mortgage.

The act, however, specifically provides that the foregoing provisions applicable to mortgages owned by saving banks and others in New York State

"shall not apply * * * to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, * * * nor to any obligations in connection with or secured by such mortgages." (Section 1077-g of Civil Practice Act as amended by Ch. 93 of Laws of 1943.)

Section 1 of the Fourteenth Amendment to the Federal Constitution provides in part:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Court of Appeals of New York State has held that a savings bank

"has neither capital nor shareholders, and its only resources are the moneys of depositors and the income which may be received from investments. The bank, necessarily from the statutory provisions, must be deemed to hold what property it has for the benefit of depositors only. It manages the same through its trustees and officers, and under no circumstances, and in no event, does it, or do its trustees, acquire any interest therein." (*People ex rel. Newburgh Savings Bank vs. Peck*, 157 N. Y. 51, 56.)

Savings banks in New York are organized under Article VI of the Banking Law, Chapter 2 of the Consolidated Laws of the State of New York, primarily for the protection of small depositors.

A savings bank may invest in the following property and securities, and no others:

... * *

"6. Bonds and mortgages on improved and unencumbered real property in this state, as provided in this subdivision.

"(a) A savings bank may invest (1) to an amount not exceeding sixty per centum of the appraised value of any such real property; or, (2) to an amount not exceeding sixty-six and two-thirds per centum of the appraised value thereof if such real property is improved by a building or buildings, the major portion of which is used, or in the case of a building under construction is to be used, for non-transient residential purposes.

“* * *” (Section 235, Banking Law.)

There is nothing in Section 235 of the Banking Law which interferes with said mortgage being payable in monthly installments over a period of more than ten years from the time of the making of the loan.

Savings and loan institutions are organized and exist by virtue of the provisions of Article X of the Banking Law (Chapter 2 of the Consolidated Laws of the State of New York). The Court of Appeals has said:

“The evident purpose of the law is to authorize the formation of these corporations, mainly for the benefit of wage earners and other people of limited means, to enable them to acquire homes and to accumulate their savings, * * *.” (*People ex rel. Fairchild v. Preston*, 140 N. Y. 549, 552.)

A savings and loan association having funds in excess of the amount needed for loans to its members may loan

“(b) Upon bonds and mortgages upon real estate: (1) situated in this state, to the extent of sixty per centum of the appraised value thereof, if such real estate has a building thereon suitable for residential, business, manufacturing or agricultural purposes, or to the extent of sixty-six and two-thirds per centum of the appraised value thereof, if such real estate is improved by a building or buildings, all or the major portion of which is used, or in the case of a building under construction is to be used, for non-transient residential purposes.” (Section 380, Banking Law, subd. 3(b).)

There is nothing in Section 380 of the Banking Law which interferes with said mortgage being payable in monthly installments over a period of more than ten years from the time of the making of the loan.

It is the contention of the *amicus curiae* that there is no such difference between a mortgage described in Section 235, subd. 6 (a) of the Banking Law relating to the investments of savings banks and a mortgage described in Section 380, subd. 3 (b) of the Banking Law relating to investments of savings and loan associations where both mortgages are payable in monthly installments over a period of more than ten years from the time of the making of the loan, which will justify a law (Chapter 93 of the Laws of 1943) which denies to a savings bank the right to compel the payment of a past due loan secured by said mortgage but at the same time permits a savings and loan association to enforce the payment of a past due loan secured by a similar mortgage.

The Civil Practice Act, Section 1077-g, as amended by Chapter 93 of the Laws of 1943, also provides that the mortgage moratorium legislation

"shall not apply to * * * any mortgage held by a savings and loan association * * * made in accordance with the provisions of section three hundred eighty-four or three hundred eighty-five of the banking law * * * nor to any obligations in connection with or secured by said mortgage."

The above quoted section 1077-g was enacted by the Laws of 1933, Chapter 793. It has since been amended by extension each year.

Sections 384 and 385 of the Banking Law referred to are now found in Banking Law, Sections 379, 380 and 381, the former sections having been renumbered by the Laws of 1939, Chapter 341.

Former Section 384 of the Banking Law was derived from the Laws of 1914, Chapter 369, Section 384. At that time Section 384 of the Banking Law provided as follows:

"Subject to the provisions of this article and its by-laws, any savings and loan association may invest the funds received by it as follows:

"* * *

"4. If at any time it has funds in excess of the amount needed for loans to its members and the payment of matured shares and withdrawals: * * *

"(b) In securities which are authorized as investments for savings banks in section two hundred thirty-nine of this chapter.

"(c) In bonds and mortgages on unencumbered real estate situated in the state of New Jersey to the extent of sixty per centum of the value thereof; provided that the real estate is 'improved' as such term is defined in subdivision five of section three hundred eighty-six of this article and is located within fifty miles of the place of business of such association."

Section 239 above referred to in (b) provided:

"A savings bank may invest the moneys deposited therein, the sums credited to the guaranty fund thereof and the income derived therefrom, in the following property and securities and no others, and subject to the following restrictions:

“6. Bonds and mortgages on unencumbered real property situated in this state, to the extent of sixty per centum of the appraised value thereof. * * *”

If when Chapter 93 of the Laws of 1943 was enacted the Legislature intended the reference therein to Sections 384 and 385 of the Banking Law to apply to said sections as they were in effect on August 26, 1933, the date of the enactment of the original Mortgage Moratorium Act, then the provisions of Section 384 are to be read as above.

If, on the other hand, the Legislature when it enacted Chapter 93 of the Laws of 1943 intended the reference in Section 1077-g to the provisions of Sections 384 and 385 of the Banking Law to apply to those sections as amended and recodified, we must look to Section 8 of Chapter 341 of the Laws of 1939, which reads:

“§ 8. Section three hundred eighty-four of such chapter as last amended by chapter eighty-five of the laws of nineteen hundred thirty-five is hereby renumbered section three hundred eighty and amended to read as follows:

“§ 380. POWER TO MAKE LOANS. A savings and loan association may lend its funds as hereinafter provided:

“* * *

“3. If at any time such association has funds in excess of the amount needed for loans to its members,

“(a) to other savings and loan associations;

“(b) upon bonds and mortgages upon real estate

"1) situated in this state, to the extent of sixty per centum of the appraised value thereof, if such real estate has a building thereon suitable for residential, business, manufacturing or agricultural purposes, or to the extent of sixty-six and two-thirds per centum of the appraised value thereof if such real estate is improved by a building or buildings all or the major portion of which is used, or in the case of a building under construction, is to be used for non-transient residential purposes."

Under either construction it is apparent that a mortgage on improved real estate in New York State securing a loan by a savings and loan association may be foreclosed in the event of a default in the payment of principal, notwithstanding the provisions of Sections 1077-a, 1077-b, 1077-c, 1077-cc, 1077-d, 1077-e and 1077-f of the Civil Practice Act, while a mortgage on improved real estate in New York State securing a loan by any other person, association or corporation, including savings banks, may not be foreclosed under similar circumstances because of a default occurring in the payment of principal.

Not only does Chapter 93 of the Laws of 1943 fail to afford a savings bank the equal protection of the law, but it also fails to afford such protection to an individual owner of a mortgage dated prior to June 1, 1932, as it prevents his foreclosure of such mortgage on account of a default in principal while permitting such a foreclosure with respect to mortgages owned by savings and loan associations.

In *Hartford Steam Boiler Inspection & Insurance Co., et al, v. Harrison, Insurance Commissioner*, 301 U. S. 441, at page 461, the Court said:

"The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37, 38:

*** it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Air-way Corp. v. Day*, 266 U. S. 71, 85; *Schlesinger v. Wisconsin*, 270 U. S. 230, 240. That is to say, mere difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin v. District of Columbia*,

205 U. S. 135, 139; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237.'

"Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Co. v. Baldwin*, 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense. In this instance, the appellant company had been licensed to do business in the State and was entitled to equal protection in conducting that business."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, at page 560, the Court said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of

the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.’ *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws.”

See also *Skinner v. Oklahoma ex rel. Williamson, Attorney General*, 316 U. S. 535; *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150.

We respectfully submit that the classification contained in Chapter 93 of the Laws of 1943 is arbitrary and unreasonable and does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

CONCLUSION

The judgment of the Court of Appeals should be reversed with costs and the case remitted to the Supreme Court of the State of New York with a direction that judgment be entered in favor of the plaintiff.

Respectfully submitted,

GEORGE R. FEARON,
Counsel for *Amicus Curiae*,
THE SAVINGS BANKS ASSOCIATION
OF THE STATE OF NEW YORK,
930 University Building,
Syracuse, New York.

EXHIBIT I**CHAPTER 793, LAWS OF 1933**

An Act to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

Section 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

Section 1077-a. Foreclosure for principal defaults suspended. During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of default in the payment of principal secured by such mortgage or solely in the payment of any installment or principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

Section 1077-b. Actions on bonds for principal defaults suspended. No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or pro-

ceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

Section 1077-c. Notice of Application. Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a

copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements.

This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

Section 1077-d. Waiver against public policy. Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

Section 1077-e. Application to pending actions. Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

Section 1077-f. Statute of limitations not to run during emergency. Any action or proceeding within the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

Section 1077-g. Mortgages not affected. The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

Section 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

Section 4. This act shall take effect immediately.

EXHIBIT II**CHAPTER 93, LAWS OF 1943**

An Act to amend chapter seven hundred eighty-two of the laws of nineteen hundred forty-one, entitled "An Act to amend the Civil Practice Act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to extend the mortgage moratorium and setting forth the terms and conditions of such extension," in relation to continuing the provisions thereof until July first, nineteen hundred forty-four.

Became a law March 11, 1943, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter seven hundred eighty-two of the laws of nineteen hundred forty-one, entitled "An Act to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages and to extend the mortgage moratorium and setting forth the terms and conditions of such extension," is hereby amended to read as follows:

Section 1. The serious public emergency, which existed at the time of the enactment of sections ten hundred and seventy-seven-a, ten hundred and seventy-seven-b, ten hundred and seventy-seven-c, ten hundred and seventy-seven-d, ten hundred and seventy-seven-e, ten hundred and seventy-seven-f and ten hundred and seventy-seven-g of the civil

practice act, as added by chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three, and at the time of the enactment of section ten hundred and seventy-seven-cc of the civil practice act, as added by chapter eight hundred and ninety of the laws of nineteen hundred thirty-four, having continued, in the judgment of the legislature, to the present time and still existing, the provisions of such chapters seven hundred and ninety-three of the laws of nineteen hundred thirty-three and eight hundred and ninety of the laws of nineteen hundred thirty-four shall, notwithstanding any provision of such chapter, remain and be in full force and effect until July first, nineteen hundred forty-four, and, in conformity with such extensions, section ten hundred and seventy-seven-g of the civil practice act, as added by such chapter seven hundred and ninety-three of the laws of nineteen hundred thirty-three and last amended by chapter seven hundred and eighty-two of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

Sec. 1077-g. Mortgages not affected. The provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage or the modification or extension of any mortgage insured, or hereafter insured under the provisions of the national housing act, in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three

hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which is provided for by extension or modification executed on or after July first, nineteen hundred thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, and in addition, to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortgage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage unless the owner of the mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum. Such principal payments shall accrue from July first, nineteen hundred forty-two, and shall be payable on October first, nineteen hundred and forty-two and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or in any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the payment by any defendant to the plaintiff of the taxable costs and disbursements, and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-four.

Section 2. This act shall take effect immediately.

EXHIBIT III**SUPREME COURT OF THE UNITED STATES****OCTOBER, 1944, TERM****No. 1174****THE EAST NEW YORK SAVINGS BANK,***Appellant,***against****ALVIN HAHN and HANNAH HAHN, his wife,***Appellees.*

The undersigned, being respectively the attorneys for the Appellant and for the Appellees in the above entitled matter, hereby consent that a brief may be filed as *amicus curiae* by The Savings Banks Association of the State of New York.

Dated: April 26, 1945.

JOHN P. McGRATH,
Counsel for Appellant.
COLLER & COLLIER,
Counsel for Appellees.